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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 167

ROY A. OAKLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 21-24) is reported at 290 F. 2d 517.

JURISDICTION

The judgment of the court of appeals was entered on May 24, 1961. The petition for a writ of certiorari was filed on June 22, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's claim, that the statute under which he was prosecuted is unconstitutionally vague and uncertain, is relevant in the present case.

2. Whether the materials which petitioner distributed through the mails were so clearly not obscene that the trial court should not have permitted the case to go to jury.

3. Whether petitioner's opinion that the material he mailed was not obscene was relevant in proving lack of *scienter*.

STATUTE INVOLVED

18 U.S.C. 1461, as amended in 1958, 72 Stat. 962, provides in pertinent part:

> Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—
>
> Every article or thing designed, adapted, or intended * * * for any indecent or immoral use; and
>
> Every article, instrument, substance * * *, or thing which is advertised or described in a manner calculated to lead another to use or apply it * * * for any indecent or immoral purpose; and
>
> Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, * * * whether sealed or unsealed; and

Every paper, writing, advertisement, or representation that any article, instrument, substance, * * * or thing may, or can, be used or applied * * * for any indecent or immoral purpose; and

Every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, * * * or thing—

Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, * * * shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

* * * * *

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Tennessee, petitioner was convicted on a one count indictment (No. 12,737; R. 8) [1] and on nine counts of a ten count indictment

[1] "R." designates the appendices to the briefs filed in the court of appeals. "T." designates the two volume transcript of the trial which we have lodged with the Clerk of this Court. The exhibits have been certified separately by the clerk of the court of appeals.

(No. 12,638; R. 1-7),[2] charging that he knowingly distributed through the mails obscene photographs and circulars and advertisements giving information as to how and where obscene pictures and books might be obtained. He was sentenced to a term of imprisonment for two years on each of these counts, to run concurrently (T. 427-428). The court of appeals unanimously affirmed (Pet. 21-24).

1. The evidence showed that petitioner conducted a mail-order business in Gallatin, Tennessee, through which he solicited orders for, and distributed through the mails, "art photos, pin-ups, art books, playing cards, French books, novels, cartoon humor, [and] color slides * * *" (T. 249). Using fictitious test names, postal inspector Simon received both solicited and unsolicited advertisements from petitioner, as well as photographs of female nudes (T. 67-69, 114-115). In April 1955, the inspector received an unsolicited circular from petitioner which read in part as follows (G. Ex. 1; T. 70, 72; see count 1, indictment 12,638 (R. 1):

> Dear Sir:
>
> Do you like girls?
>
> We have a photographic collection of busty belles gathered from all over the U.S.A.—carefully selected from our private files—artistic and unretouched; dazzling blondes, bewitching brunettes, flaming redheads. ALL POSED IN THE NUDE.
>
> * * * * *

[2] Count seven of the indictment was dismissed on the motion of the government (T. 380).

The circular went on to state that to receive these pictures the purchaser must certify he was over 21 years of age, qualify as a "photographer, student of photography, commercial artist, painter or sculptor," and agree not to "let anyone know where [he received the pictures], unless they are a very close friend and [he was] absolutely sure they can be trusted" (T. 72). The pictures were priced from $2.00 per set of ten to $12 for 12 sets. Similar advertising materials were received by the postal inspector under other test names. He also ordered and received photographs of completely nude females as well as almost-nudes wearing slight apparel (T. 74-79, 113-116, 119; see, *e.g.*, G. Exs. 3, 9).

In May 1957, witness W. Anthony Browne received from petitioner through the mails an unsolicited circular bearing the title, "Tenth Anniversary Special * * * Breath Taking Beauties Posed Nude", advertising books of nudes with the further comment that "These Books are Banned by Bluenoses Everywhere" (G. Ex. 14; T. 98; see T. 95-97; count 3, indictment 12,638 (R. 2-3)). In February 1958, Richard Lenz of Edwardsville, Illinois, received an advertising circular from petitioner stating, "Mail your orders to Roy A. Oakley, 627 West Eastland, Gallatin, Tenn-o-see (sic). * * * In our 11th year of mailing Gal Pics from Gallatin all over the globe" (G. Ex. 13; T. 90; see T. 86-89; count 4, indictment 12,638 (R. 3-4); see also T. 83-86; G. Ex. 12).

Petitioner testified that he received 150 to 200 letters a day containing orders for his material or request-

ing his catalogue (T. 259-260), and that he had filled orders from each state of the union and some 40 or 50 foreign countries (T. 260). He stipulated that he had mailed all of the material as charged in counts 1-6 and 8-9 of indictment 12,638 (T. 181, 197). When he was arrested by inspector Simon, he was found to be in possession of a mailing list containing several thousand names (T. 121).

2. In instructing the jury as to the standard it should apply in deciding whether the material petitioner sent through the mails was obscene, the trial judge quoted extensively from this Court's opinion in *Roth* v. *United States*, 354 U.S. 476 (see T. 394-397), and, in addition, charged as follows (R. 400-401):

> In determining [obscenity] the question is whether or not, to the average person, such material or any such material considered as a whole and applying contemporary community standards, whether the dominant theme of such material would appeal to prurient interest. It is not whether it appeals to you as an individual as having primarily a theme of this kind or whether it appeals to prurient interest, but it is whether to the average person of the community applying these contemporary community standards it would have this effect or impact; and, as I stated a moment ago, the material itself must be looked at in its entirety. You will not consider just one detached part of it, but you will view the entire item of evidence itself and determine what its dominant theme is, applying these standards and consider-

ing the evidence introduced here before you in its entirety.

The Court further instructs you in this case that reproductions of the human nude, even in unretouched form, are not, without more, obscene, * * * nudity per se is not obscene, the test being * * * whether or not the dominant theme of the material appeals to the prurient interest: Would it have that effect on the average person of the community applying contemporary community standards?

ARGUMENT

1. The argument petitioner makes (Pet. 6-9) that 18 U.S.C. 1461, as amended in 1958, is unconstitutionally vague was before the Court in *Collier* v. *United States*, certiorari denied, 365 U.S. 833, No. 571, O.T. 1960, and *Womack* v. *United States*, certiorari denied, 365 U.S. 859, No. 717, O.T. 1960. As in those cases, the clause challenged by petitioner is "[w]hoever * * * knowingly causes [non-mailable matter] to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed * * *." The purpose of the amendment was to make a violation of 18 U.S.C. 1461 a continuing offense, permitting prosecution, not only in the district where the mailing occurred (as under the pre-1958 statute), but also in the district of delivery and the intervening districts. See H. Conf. Rep. No. 2624, 85th Cong., 2d Sess.; S. Rep. No. 1839, 85th Cong., 2d Sess. In the light of this purpose, it is difficult to see how the language of which petitioner complains is vague or indefinite.

In any event, petitioner's sentence on the one-count indictment returned in Florida and transferred on his motion to the Middle District of Tennessee runs concurrently with the sentence imposed on the Tennessee indictment (the ten-count indictment). Since the total sentence is supportable on any one of the counts of the Tennessee indictment, which charged unlawful mailing, prior to the 1958 amendment of 18 U.S.C. 1461, petitioner is in no position to attack the amended language on which the Florida indictment was based. See, *e.g., Lawn* v. *United States*, 355 U.S. 339, 359; *Hirabayashi* v. *United States*, 320 U.S. 81, 85.

2. Petitioner's contention (Pet. 9-17) that the courts below applied a standard of obscenity in conflict with the decisions of this Court in *Roth* v. *United States*, 354 U.S. 476, and *Sunshine Book Co.* v. *Summerfield*, 355 U.S. 372, is without merit. The trial judge expressly instructed the jury (*supra*, p. 7) that

> reproductions of the human nude, even in unretouched form, are not, without more, obscene. * * * nudity per se is not obscene * * *.

The test for the jury, as the court phrased it, was—

> whether or not the dominant theme of the material appeals to the prurient interest: Would it have that effect on the average person of the community applying contemporary community standards?

Other portions of the charge defined prurient interest in the terms of the *Roth* decision. The court of appeals affirmed on the same principles (Pet. 23-24).

Essentially, petitioner's argument is that there was not sufficient evidence to permit a jury to find that the material he mailed appealed to the prurient interest, since the case involves only human nudity, and the human nude, as portrayed in art throughout the ages, is not obscene. But, as the *Roth* opinion makes clear (354 U.S. at 487-489), and as the trial court below so carefully instructed the jury, human nudity in art is one thing—the human nude so posed as to appeal to the prurient interest is quite another. Certainly it was not unreasonable for the jury to find that the photographs involved here, with their full exposure of the genital area, did appeal to the prurient interest, especially when viewed in relation to petitioner's method of advertising his wares, in which he used such phrases as "busty belles", "unretouched", "posed in the nude", "banned by bluenoses everywhere"; his representations of selling only to adults who were qualified as "student[s] of photography"; and his caution against disclosure of the source of the pictures except to "close" and "trusted" friends. Nor was it unreasonable for the jury to conclude in light of the evidence that this advertising did indeed give information where obscene material could be obtained. As the court below stated, "The subjects were so posed and slight apparel so added on some of the pictures, as to enhance the prurient response invited. Defendant's advertising material gave subtle assurance that lustful curiosity would be satisfied by purchase of his material" (Pet. 23-24). Thus, it cannot be said that petitioner's material was not obscene as a matter of

law. At most, there was posed a question of fact for the jury to resolve.

Nothing to the contrary was decided in *Sunshine Book Co.* v. *Summerfield, supra.* As the Fourth Circuit pointed out in *Collier* v. *United States,* 283 F. 2d 780, 782, certiorari denied, 365 U.S. 833, the photographs of nudes which the lower courts had erroneously held to be obscene in the *Sunshine* case were "only part of a publication devoted to the promotion or discussion of a particular idea such as the cult of nudism * * *." Here, as in the *Collier* and *Womack* cases, petitioner was engaged in nothing more than the peddling of obscenity. See also *Manual Enterprises, Inc.* v. *Day,* pending on petition for a writ of certiorari, No. 123, this Term.

3. Contrary to petitioner's final contention (Pet. 18-19), the trial court was correct in charging the jury that it was "immaterial whether the defendant knew or whether he believed that the materials mailed by him were obscene" (T. 399). Clearly, there is a vast difference between the requirement of *scienter* (see *Smith* v. *California,* 361 U.S. 147) and the question of petitioner's opinion that the material he had mailed was not legally obscene. As the trial court properly charged: "The inquiry for you is whether the materials were, in fact, obscene; and that does not depend, of course, upon the defendant's opinion. The defendant is merely required, insofar as knowledge is concerned, to know the contents of the materials and to know that he deposited or caused to be deposited such materials in the United States mails" (T. 399). See

Rosen v. *United States*, 161 U.S. 29, 42; *Roth* v. *United States*, *supra*, 354 U.S. at 491. Moreover, not only was there no objection to this instruction (see Rule 30, F.R. Crim. P.), but one of petitioner's counsel advised the trial judge that he thought "it represents the law" (T. 368-369, 377).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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